

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1555

U.S. BANK TRUST, N.A.<sup>1</sup>  
vs.

JOHN W. MINNEHAN & another.<sup>2</sup>

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Following a foreclosure, the defendants, John W. Minnehan and Anne B. Minnehan, appealed from a Housing Court judgment for possession entered in favor of the plaintiff, U.S. Bank Trust, N.A., as trustee on behalf of LSF9 Master Participation Trust (U.S. Bank). The Minnehans' appeal was dismissed when they failed to pay an appeal bond ordered pursuant to G. L. c. 239, §§ 5 and 6, in the amount of \$42,125.96. They now appeal from the order of dismissal. We confine our review to the question whether the judge erred in calculating the amount of the bond,<sup>3</sup> and we affirm.

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<sup>1</sup> As Trustee on behalf of LSF9 Master Participation Trust.

<sup>2</sup> Anne B. Minnehan.

<sup>3</sup> After the bond was ordered, the Minnehans brought a motion for reconsideration with which they filed an affidavit of indigency. In their motion, the Minnehans contended that they are indigent for purposes of the bond because they are unable to pay it

Section 5 of the summary process statute, G. L. c. 239, requires payment of an appeal bond in eviction cases. Section 6 of the statute deals specifically with appeals from evictions after foreclosure, stating, "If the action is for the possession of land after foreclosure of a mortgage thereon, the condition of the bond shall be for the entry of the action and payment to the plaintiff, if final judgment is in his favor, of all costs and of a reasonable amount as rent of the land from the day when the mortgage was foreclosed until possession of the land is obtained by the plaintiff." G. L. c. 239, § 6.

In considering U.S. Bank's motion to set a bond, the Housing Court judge correctly identified § 6 as the relevant provision for determining the amount. See Adjarthey v. Central Div. of the Hous. Court Dep't, 481 Mass. 830, 858 (2019). See

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without depriving themselves "of the necessities of life, including food, shelter and clothing . . . ." See G. L. c. 261, § 27A. See also, G. L. c. 239, § 5 (e) (incorporating G. L. c. 261, § 27A, as supplying definition of indigent). Although the Minnehans did not separately file a motion for waiver of the bond, they made a passing request for such a waiver in their motion for reconsideration. After the motion for reconsideration was denied without a hearing, the Minnehans appealed to a single justice of this court pursuant to G. L. c. 239, § 5 (f), filing a memorandum that argued indigency but requested only a reduction in the amount of the bond. The single justice affirmed the original appeal bond order. The Minnehans thereafter failed to pay the bond, resulting in the dismissal of their appeal. See G. L. c. 239, § 5 (h). At oral argument in the instant matter, the Minnehans' counsel stated that the Minnehans do not currently seek a waiver of the bond, but instead seek a reduction in the bond amount.

also Home Sav. Bank of Am., FSB v. Camillo, 45 Mass. App. Ct. 910, 911 (1988) ("Section 6 of c. 239 spells out what damages a bond shall protect in the case of a summary process action arising out of mortgage foreclosure").

After a hearing, the judge found that the fair rental value of the subject property was \$2,370 per month, based on figures supplied by the Federal Department of Housing and Urban Development. In so doing, the judge commented, "The court notes that the approximate monthly payment that would have been due under the [Minnehans'] promissory note plus taxes exceeds the fair rental value for the [p]remises as claimed by [U.S. Bank]." Based on the established monthly rental value, the judge calculated the amount of the bond by multiplying \$77.92 per day by the number of days since the date of the foreclosure (i.e., 538 days), and added \$205 to cover the costs awarded to U.S. Bank as of the time of the judgment. The judge ordered, as an additional condition of the bond, that the Minnehans pay use and occupancy in the amount of \$2,370 per month from August 1, 2018, forward during the pendency of the appeal. The Minnehans make three arguments as to how the judge erred in calculating the amount of the bond, none of which carry the day.<sup>4</sup>

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<sup>4</sup> The Minnehans' constitutional arguments are cursory, incorporating wholesale a single justice petition filed in the Supreme Judicial Court pursuant to G. L. c. 211, § 3, in a case where only U.S. Bank (and not the Minnehans) was a party. We

First, the Minnehans argue that a summary process appeal bond cannot exceed the amount of damages awarded in the underlying eviction case. The Minnehans urge that since U.S. Bank did not receive an award of damages as part of the judgment (although it requested them in its initial pleading), the appeal bond should be limited to the \$205 in costs that U.S. Bank was awarded. We turn to the plain text of the statute, see Cambridge St. Realty, LLC v. Stewart, 481 Mass. 121, 137 (2018), and find nothing there that supports this view. On the contrary, the statute expressly requires a bond in the amount of all costs and a "reasonable amount as rent of the land" from the date of foreclosure. See G. L. c. 239, § 6. See also Megliola v. Municipal Court of the West Roxbury Dist. of Boston, 299 Mass. 325, 327 (1938).

Next, the Minnehans argue that the second sentence of G. L. c. 239, § 6,<sup>5</sup> and not the first, controls this case.

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decline to address them. See Mass. R. A. P. 16 (a) (9) (B), as amended, 428 Mass. 1603 (1999) (we cite to the Massachusetts Rules of Appellate Procedure in effect during the relevant time period. The Rules were wholly revised, effective March 1, 2019, primarily for stylistic and organizational purposes. See Mass. R. A. P. 1, Reporter's Notes -- 2019. The substantive requirements of Rule 16 at issue in this case are unchanged. See Mass. R. A. P. 16, as amended, 481 Mass. 1628 [2019]). See also Lolos v. Berlin, 338 Mass. 10, 14 (1958) (right of party to review entails duty "to assist the court with argument and appropriate citation of authority").

<sup>5</sup> Section 6 provides in part: "If the action is for possession of land after purchase, the condition of the bond shall be for

Accordingly, they say, the calculation of the bond amount should have been made from the date U.S. Bank took title, not the date of the foreclosure. This is not, however, a case where the plaintiff is a third party who purchased the subject property after a foreclosure. Here, the Minnehans admit that U.S. Bank was the foreclosing entity and was the high bidder at its own auction. Accordingly, calculation of the bond from the date of the foreclosure was perfectly consistent with the plain language of the statute.<sup>6</sup> See G. L. c. 239, § 6.

Third, the Minnehans argue that because they are not U.S. Bank's tenants, fair rental value is not an appropriate measure

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the entry of the action and payment to the plaintiff, if final judgment is in his favor, of all costs and of a reasonable amount as rent of the land from the day that the purchaser obtained title to the premises until the delivery of possession thereof to him, together with all damage and loss which he may sustain by withholding of possession of the land or tenement demanded, and by any injury done thereto during such withholding with all costs."

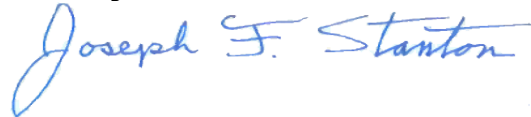
<sup>6</sup> Additionally, G. L. c. 239 expressly recognizes that summary process matters may be initiated by buyers whose sellers (or those acting under them) have failed to turn over the purchased land. See G. L. c. 239, § 1 (entitling person "who has acquired title to land or tenements by purchase" to bring summary process action where "the seller or any person holding under him refuses to surrender possession thereof to the buyer"). Thus, recalcitrant sellers might be one category of appellants to whom the second sentence of G. L. c. 239, § 6, is directed. We note further that the second sentence of § 6 (unlike the first) expressly seeks to compensate a prevailing landowner for "loss" or "injury" arising from the occupant's refusal to turn over the premises. See G. L. c. 239, § 6. Application of this provision to foreclosed mortgagors could result in a larger bond than that available under the first sentence of § 6.

for the bond amount or ongoing use and occupancy payments -- which should both be limited to that amount necessary to maintain U.S. Bank's property interest (i.e., the costs of municipal taxes and homeowners' insurance) from the time of foreclosure. Again, the Minnehans' position is not grounded in the language of the statute, which explicitly refers to "a reasonable amount as rent of the land." G. L. c. 239, § 6. Moreover, here, the Housing Court judge expressly found that the amount she calculated as fair market rent is less than the Minnehans would have been required to pay monthly as debt service together with taxes, had foreclosure not occurred. While "[a]n excessive appeal bond may not, of course, be employed to deny a meritorious appeal to a person of modest means," the requirement that an occupant pay "rent" during the pendency of an appeal serves dual rational purposes of discouraging frivolous appeals and providing "a degree of financial protection during the course of litigation which may well be protracted." Kargman v. Dustin, 5 Mass. App. Ct. 101, 113 (1977). We perceive no error in the judge's calculation of the bond amount.

Because the appeal bond was properly calculated, dismissal was warranted when the Minnehans failed to pay it. See G. L. c. 239, § 5 (h).

Order dismissing appeal  
affirmed.

By the Court (Vuono, Kinder &  
Singh, JJ.<sup>7</sup>),



Clerk

Entered: August 9, 2019.

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<sup>7</sup> The panelists are listed in order of seniority.